SUMMARY
September 28, 2023

**2023COA86**

**No. 21CA1136, *People v. C.H.* — Public Records — Criminal Justice Record Sealing — Sealing of Criminal Conviction and Criminal Justice Records — Sealing Criminal Justice Records Other than Convictions — Deferred Judgments**

A division of the court of appeals interprets several statutes that govern the sealing of criminal records.

First, the division concludes that section 24-72-706(2)(b), C.R.S. 2023, allows a court to seal the records of a misdemeanor offense that would otherwise be ineligible for sealing under section 24-72-706(2)(a) if the court finds, by clear and convincing evidence, that the defendant's need for sealing is significant and substantial, the passage of time is such that the defendant is no longer a threat to public safety, and disclosure of the record is no longer necessary to protect or inform the public. Because the trial court didn't apply this standard when it denied the defendant's motion to seal her

criminal records, the division reverses the order to the extent that it denied the defendant's request to seal conviction records and remands the case for the trial court to consider the request under the applicable standard.

Second, the division concludes that section 24-72-705(1)(a)(IV), C.R.S. 2023, does not allow a court to seal the records of a successfully completed deferred judgment if the defendant was convicted of an offense in the same case as the deferred judgment. Accordingly, the division affirms the trial court's order to the extent that it denied the defendant's request to seal a successfully completed deferred judgment entered in the same case as a conviction.

Third, the division concludes that a successfully completed deferred judgment is not a "conviction" under the sealing statutes. Accordingly, the division concludes that section 24-72-703(12)(a)(I), C.R.S. 2023 — which permits the sealing of "conviction" records only if "every conviction of the defendant" in the case may be sealed — doesn't prevent the records of a conviction from potentially being sealed simply because of the existence of a successfully completed deferred judgment in the same case.

COLORADO COURT OF APPEALS **2023COA86**

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Court of Appeals No. 21CA1136
Boulder County District Court No. 07CR1754
Honorable Patrick D. Butler, Judge
Honorable Norma A. Sierra, Judge

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The People of the State of Colorado,

Plaintiff-Appellee,

v.

C.H.,

Defendant-Appellant.

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ORDER AFFIRMED IN PART AND REVERSED IN PART,
AND CASE REMANDED WITH DIRECTIONS

Division VI
Opinion by JUDGE GOMEZ
Welling and Lipinsky, JJ., concur

Announced September 28, 2023

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¶ 1 Defendant, C.H., appeals the trial court's denial of her motion to seal her criminal records in this case.[1]

¶ 2 A portion of C.H.'s motion is governed by provisions of the sealing statutes that the General Assembly substantially modified in 2019. Those legislative changes "vastly expand[ed] the ability to seal criminal convictions at the misdemeanor and low- to mid-felony levels." Gordon P. Gallagher, *Sealing Criminal History Records for Convictions Under C.R.S. §§ 24-72-701 et seq.*, 49 Colo. Law. 32, 33 (Nov. 2020); *see also* Ch. 295, 2019 Colo. Sess. Laws 2732. The impact of sealing a defendant's records is significant: the defendant isn't required to disclose the records when seeking employment, housing, or benefits; and criminal justice agencies will respond to inquiries indicating that no such records exist. *See* § 24-72-703(2)(b), (d)(I), C.R.S. 2023; *D.W.M. v. Dist. Ct.*, 751 P.2d 74, 75 (Colo. App. 1988).

¶ 3 One of the 2019 legislative changes expanded the types of convictions for which records may be sealed. Section 24-72-706(1), C.R.S. 2023, now broadly provides for the sealing of conviction

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[1] We identify the defendant by her initials, rather than her name, in recognition of the privacy interests at stake.

records so long as sufficient time has passed since the conviction; certain criteria are satisfied; and, where required, the court makes a finding that the harm to the defendant's privacy or the dangers of unwarranted, adverse consequences to the defendant outweigh the public interest in retaining public access to the records. However, the statute excepts from these provisions records pertaining to several types of offenses, including "a criminal conviction for which the underlying factual basis involves domestic violence as defined in section 18-6-800.3," C.R.S. 2023. § 24-72-706(2)(a)(VI)(E). Such records can be sealed only if the offense was a misdemeanor and only if the district attorney consents to the sealing or a court

> finds, by clear and convincing evidence, that the [defendant's] need for sealing of the record is significant and substantial, the passage of time is such that the [defendant] is no longer a threat to public safety, and the public disclosure of the record is no longer necessary to protect or inform the public.

§ 24-72-706(2)(b). These provisions apply retroactively to all eligible cases. § 24-72-706(3).

¶ 4 C.H. sought to seal the records of two offenses from more than a decade earlier — one resulting in a misdemeanor conviction for harassment and the other resulting in a deferred judgment for

trespass that was later dismissed. Without directly addressing the trespass deferred judgment, the trial court concluded that the harassment conviction involved domestic violence and therefore was ineligible for sealing. We agree with the trial court that the conviction involved domestic violence and, thus, fell within the exclusion in section 24-72-706(2)(a)(VI)(E). But at that point, the court should've applied section 24-72-706(2)(b), which allows the records of otherwise-excluded misdemeanor offenses to be sealed if the court finds that the requisite criteria have been proved by clear and convincing evidence.

¶ 5 We also conclude, interpreting other sections of the sealing statutes, that the records of C.H.'s trespass deferred judgment are not eligible for sealing but that the existence of the deferred judgment doesn't prevent the records of the harassment conviction from potentially being sealed.

¶ 6 Accordingly, we affirm the trial court's order to the extent that it denied the request to seal records of the trespass deferred judgment, we reverse the order to the extent that it denied the request to seal records of the harassment conviction, and we remand the case for the trial court to consider and make findings

on the request to seal the records of the harassment conviction under the standard set forth in section 24-72-706(2)(b).

## I. Factual Background

¶ 7 When she was a college student in the mid-2000s, C.H. was charged with three offenses arising out of an incident in which she broke into her ex-boyfriend's room, slapped and pushed him several times, and demanded that they talk about their relationship until the ex-boyfriend was able to get away from her. All three offenses were charged as acts of domestic violence.

¶ 8 Pursuant to a plea agreement, C.H. pleaded guilty to harassment (a misdemeanor), she pleaded guilty under a deferred judgment to first degree criminal trespass (a felony), and the third charge was dismissed. The trial court accepted her plea and entered an order "find[ing] that the underlying factual basis in the . . . case constitutes an act of DOMESTIC VIOLENCE pursuant to [section] 18-6-800.3." After C.H. successfully completed the two-year term of her deferred judgment, the court dismissed the trespass charge with prejudice.

¶ 9 More than a decade later, in 2021, C.H. filed a motion to seal her criminal records from this case, explaining that she "ha[s] had

no similar problems since" the single incident from her college days and that she "find[s] it very difficult even after many years to find employment and would like to get on with [her] life." The district attorney objected to the motion.

¶ 10 The trial court denied C.H.'s motion on the basis that "[t]he misdemeanor charge [for harassment] remained a conviction" after the dismissal of the trespass charge, and both charges had been "charged as Domestic Violence charges." It later denied C.H.'s motion for reconsideration, reasoning that "a conviction remains [on the harassment charge], an offense with an underlying factual basis of domestic violence," and "[s]tatutorily, the Colorado Legislature does not permit the [c]ourts to seal such records of convictions."

¶ 11 On appeal, C.H. contends that the trial court erred by denying her motion to seal and by not holding a hearing on that motion. We first provide some additional statutory background and then turn to her contentions.

## II. The Sealing Statutes

¶ 12 The statutes governing the sealing of criminal records are currently located in part 7 of title 24, article 72. Four of those statutes are relevant to this case.

¶ 13 First, section 24-72-701, C.R.S. 2023, provides definitions applicable to all of the sealing statutes. These include a definition of the term "conviction": "a criminal judgment of conviction," with "infractions that constitute civil matters" specifically excluded. § 24-72-701(2.5).[2]

¶ 14 Second, section 24-72-703 sets forth various general provisions regarding record sealing. Among those provisions is an exclusion providing as follows:

> Notwithstanding any provision in this part 7 to the contrary, in regard to any conviction of the defendant resulting from a single case in which the defendant is convicted of more than one offense, records of the conviction may be sealed pursuant to the provisions of this part 7 *only if the records of every conviction of the defendant resulting from that case may be sealed pursuant to the provisions of this part 7*.

§ 24-72-703(12)(a)(I) (emphasis added).

¶ 15 Third, section 24-72-705, C.R.S. 2023, sets forth provisions for sealing criminal justice records other than convictions. Under this statute, records are sealed automatically when a case is

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[2] The General Assembly added this definition as part of another set of amendments in 2022, after the trial court had resolved the underlying motion to seal. *See* Ch. 276, sec. 9, § 24-72-701(2.5), 2022 Colo. Sess. Laws 1987.

completely dismissed, the defendant is acquitted of all counts in the case, the defendant successfully completes a diversion program after the filing of a criminal case, or, as relevant here, "[t]he defendant completes a deferred judgment and sentence . . . and all counts are dismissed." § 24-72-705(1)(a)(IV).

¶ 16 And fourth, section 24-72-706 sets forth provisions for sealing criminal conviction records. This includes the provisions recounted above regarding the general standard for sealing conviction records, exclusions for certain types of convictions, and an alternative standard for misdemeanor offenses that fall within the exclusions.

## III. Motion to Seal

¶ 17 We now turn to C.H.'s contention that the trial court erred by denying the motion to seal her records relating to the harassment conviction and the trespass deferred judgment.

### A. Standard of Review

¶ 18 We generally review for an abuse of discretion a trial court's decision whether to seal criminal records. *Robertson v. People*, 2017 COA 143M, ¶ 9. A court abuses its discretion when its decision is manifestly arbitrary, unreasonable, or unfair or is contrary to law. *People v. Toro-Ospina*, 2023 COA 45, ¶ 30.

¶ 19 However, we review questions of statutory interpretation de novo. *In re R.C.*, 2013 COA 77, ¶ 6. Our primary task in interpreting statutes is to ascertain and give effect to the General Assembly's intent. *People v. Sprinkle*, 2021 CO 60, ¶ 22. To do so, we start with the language of the statute, giving the statutory words their plain and ordinary meanings and giving consistent, harmonious, and sensible effect to each part of the statute. *People v. Burgandine*, 2020 COA 142, ¶¶ 6-7. If the plain language of the statute is clear and unambiguous, we apply it as written. *Id.* at ¶ 6.

¶ 20 The Harassment Conviction

¶ 21 We first consider the trial court's denial as it relates to the harassment conviction.

¶ 22 C.H. initially maintains that subsections (2)(a)(VI)(E) and (2)(b) of section 24-72-706 don't apply to this conviction because the harassment statute doesn't reference domestic violence. We disagree. The trial court specifically found, at the time it accepted C.H.'s plea, that the underlying factual basis in the case constituted an act of domestic violence under section 18-6-800.3. Indeed, this charge was brought as a domestic violence charge, it was never amended to remove that designation, and the arrest affidavit

described the allegations of domestic violence surrounding the incident. Accordingly, the court was correct when, in considering the motion to seal, it recognized that the harassment conviction involved domestic violence and thus fell within the scope of the domestic violence exclusion.

¶ 23 But the court erred by ending its analysis there. In its initial order, the court didn't offer any other explanation for denying the motion to seal. Then, on reconsideration, after reiterating that the harassment conviction involved domestic violence, the court erroneously stated that "[s]tatutorily, the Colorado Legislature does not permit the [c]ourts to seal such records of convictions."

¶ 24 In actuality, the General Assembly *does* permit courts to seal such records in some circumstances. As a misdemeanor conviction that is excepted from the general sealing provisions under section 24-72-706(2)(a)(VI)(E) because of its domestic violence underpinnings, the records of the harassment conviction can still be sealed if the court finds, by clear and convincing evidence, that (1) C.H.'s need for sealing is significant and substantial; (2) the passage of time is such that C.H. is no longer a threat to public safety; and (3) public disclosure of the record is no longer necessary

to protect or inform the public. *See* § 24-72-706(2)(b). Thus, the court should've considered and made factual findings on those criteria.

¶ 25 We disagree with the People's contention that such findings are required only when a court grants a motion to seal. To the contrary, regardless of whether a court grants or denies such a motion, it must consider and make findings as to whether the criteria in section 24-72-706(2)(b) are satisfied.

¶ 26 We also disagree with the People's contention that C.H.'s motion was insufficient on its face, such that the court didn't need to engage in this analysis. C.H.'s allegations that the records related to a "single event" while she was in college over a decade ago, that she'd had "no similar problems since," and that she "f[ou]nd it very difficult even after many years to find employment" sufficiently addressed the section 24-72-706(2)(b) criteria to warrant further consideration.

¶ 27 But that doesn't end the matter. Because the harassment conviction was entered in the same case as a deferred judgment, we have to consider the impact of the deferred judgment on C.H.'s

potential right to have any of the records from the case sealed. We turn to that issue now.

B. The Trespass Deferred Judgment

¶ 28 The impact of the deferred judgment from the trespass charge is governed by the intersection of two of the other sealing statutes: section 24-72-703(12)(a)(I), which permits the sealing of "conviction" records only if the records of "every conviction of the defendant" in the case may be sealed, and section 24-72-705(1)(a)(IV), which provides for the sealing of deferred judgment records, but only when "[t]he defendant completes [the] deferred judgment and sentence . . . and all counts are dismissed."

¶ 29 In their answer brief, the People argue that a deferred judgment constitutes a "conviction," such that, under section 24-72-703(12)(a)(I), none of the records in this case can be sealed unless the records from both the harassment conviction *and* the trespass deferred judgment are eligible for sealing. And, they go on, the records from the deferred judgment aren't eligible for sealing under section 24-72-705(1)(a)(IV) because not all of the counts in the case were dismissed. This, they say, leaves C.H. with section 24-72-706(2)(a)(VI)(E) and (2)(b), which don't allow sealing of the

deferred judgment because it arose from a domestic violence incident and was a felony offense. Thus, it would seem, the records of the deferred judgment can't be sealed; and because the records of that part of the case can't be sealed, then, under section 24-72-703(12)(a)(I), none of the case records can be sealed.

¶ 30 For her part, C.H. argues that the records relating to the trespass deferred judgment should be sealed, regardless of the outcome of her request to seal the records of the harassment conviction, because she successfully completed her deferred judgment and the trespass charge was dismissed.

¶ 31 Neither party is entirely correct.

¶ 32 We agree with the People that, under the plain language of section 24-72-705(1)(a), the records of the deferred judgment are not eligible for sealing due to the misdemeanor conviction entered in the same case. The statute expressly provides for the sealing of records relating to a deferred judgment only when "[t]he defendant completes a deferred judgment and sentence . . . and *all counts are dismissed*." § 24-72-705(1)(a)(IV) (emphasis added). Because not all counts in this case were dismissed, the records relating to the deferred judgment aren't eligible for sealing. *See People v.*

*Chamberlin*, 74 P.3d 489, 489-90 (Colo. App. 2003) (under a prior version of the statute allowing for sealing "in any case which was completely dismissed," § 24-72-308(1)(a)(I), C.R.S. 2002, the defendant's records couldn't be sealed where two counts were dismissed but the defendant pleaded guilty to, and a conviction entered for, a third count).

¶ 33 But what does that mean for the misdemeanor harassment conviction? Does section 24-72-703(12)(a)(I) — which precludes the sealing of conviction records unless "the records of every conviction of the defendant" in that same case can be sealed — apply to prevent the potential sealing of the harassment conviction, given the existence of the trespass deferred judgment in the same case?

¶ 34 The answer to these questions depends on the meaning of the term "conviction" in the sealing statutes, and whether it includes successfully completed deferred judgments. Our supreme court has remarked that "[t]he term 'conviction' may be interpreted differently depending upon the statute in which it is used and the issue in a particular case." *Hafelfinger v. Dist. Ct.*, 674 P.2d 375, 376 (Colo. 1984). And, as we've noted, following the trial court's ruling in this case, the General Assembly amended the sealing

statutes to define a "conviction" for purposes of those statutes as "a criminal judgment of conviction." § 24-72-701(2.5).

¶ 35 We conclude that the term "conviction" in the sealing statutes doesn't include a successfully completed deferred judgment. We reach this conclusion for several reasons. First, the juxtaposition of sections 24-72-705 and 24-72-706 indicates as much. Section 24-72-705 includes the provisions for deferred judgments along with provisions for dismissals, acquittals, and completed diversion agreements. Other than in the title ("Sealing criminal justice records other than convictions . . .") — which indicates that its provisions do *not* relate to convictions — section 24-72-705 never references any "conviction." Section 24-72-706, by contrast, addresses the sealing of various criminal conviction records; and the sealing provisions and exceptions to those provisions repeatedly reference "conviction[s]." *See, e.g.*, § 24-72-706(1), (2)(a).

¶ 36 Second, in most instances in which it's confronted the issue, our supreme court has recognized that a deferred judgment that has been successfully completed, leading to dismissal of the charge, is not a "conviction." *See, e.g.*, *McCulley v. People*, 2020 CO 40, ¶¶ 27-34 (a defendant who has successfully completed a deferred

judgment doesn't have a "conviction" for purposes of the statute governing discontinuance of the requirement to register as a sex offender); *Hafelfinger*, 674 P.2d at 377 n.3 (a defendant who has successfully completed a deferred judgment has no longer been "convicted" for purposes of the statute governing eligibility for personal recognizance bonds). More generally, the court has acknowledged that a deferred judgment and sentence "is not a conviction [or] a sentence" but, rather, "is a dispositional alternative imposed *in lieu of* a judgment and sentence." *DePriest v. People*, 2021 CO 40, ¶ 13 (quoting *People v. Anderson*, 2015 COA 12, ¶ 15).

¶ 37 Nonetheless, as the People point out, the supreme court and a division of this court interpreted successfully completed deferred judgments to constitute "convictions" under an earlier version of section 24-72-705. At the time of those cases, the statute provided for the sealing of criminal records when a person wasn't charged, a case was completely dismissed, or a person was acquitted, but with several exclusions. § 24-72-308(1)(a)(I), (3), C.R.S. 2011. The supreme court in *M.T. v. People* concluded that, although the statute didn't then expressly reference a successfully completed deferred judgment, such a disposition generally fell within the

statute's scope, as it would result in a case that was completely dismissed. 2012 CO 11, ¶¶ 10-12. But, the court went on, the statutory exclusion for a "conviction of an offense for which the factual basis involved unlawful sexual behavior," § 24-72-308(3)(c), C.R.S. 2011, applied to deferred judgments, because the language in the exclusion couldn't be superfluous, yet the statute didn't address any circumstance that could potentially be considered a "conviction" other than a deferred judgment. *Id.* at ¶¶ 6, 13-14, 22. A division of this court followed suit in *In re Harte*, concluding that another statutory exclusion for a "conviction" of an alcohol- or drug-related driving offense also applied to a deferred judgment. 2012 COA 183, ¶¶ 5, 14-28.

¶ 38 But the statute we are construing today is far different than the one construed in *M.T.* and *Harte*. Section 24-72-705 now expressly includes successfully completed deferred judgments; and the exceptions to sealing are now provided in a separate section, section 24-72-706(2)(a), relating specifically to convictions. The court in *M.T.* considered a statute that couldn't reasonably be interpreted any other way because it included exceptions for certain "convictions" but, other than deferred judgments, didn't address

any dispositions that could be viewed as convictions. *See M.T.*, ¶¶ 5-6, 13-14. We are not faced with any such conundrum.

¶ 39 And third, the newly added definition, although not in place at the time of the trial court's ruling, supports our interpretation. *See Francen v. Colo. Dep't of Revenue*, 2014 CO 54, ¶ 41 (Hood, J., dissenting) ("[W]here . . . [an] amending legislature declares what it thinks an older statute was intended to mean, nothing stops us from considering that declaration as persuasive authority."). That definition now clarifies that a "conviction" is a "criminal judgment of conviction." § 24-72-701(2.5). And although a "conviction" may at times be equated with a guilty plea, and thus encompass a deferred judgment, a "judgment of conviction" involves an entry of judgment that never occurs in a successfully completed deferred judgment. *See* § 18-1.3-102(1)(a), (2), C.R.S. 2023 (in a deferred judgment, the court "continue[s] the case for the purpose of entering judgment and sentence upon the plea of guilty" at a later time, and, upon successful completion of the conditions, the guilty plea is withdrawn and the charge is dismissed with prejudice); *see also Kazadi v. People*, 2012 CO 73, ¶¶ 18-19; *Hafelfinger*, 674 P.2d at 378; *People v. Blackwell*, 2016 COA 136, ¶ 13.

¶ 40 Therefore, we conclude that the limitation in section 24-72-703(12)(a)(I) regarding "convictions" doesn't apply to successfully completed deferred judgments. So even though the records of the trespass deferred judgment aren't eligible for sealing, the records of the harassment conviction may be sealed if the trial court finds that the section 24-72-706(2)(b) criteria are satisfied. *See R.C.*, ¶¶ 2, 18-19 (offense-specific sealing is permitted unless the sealing statutes provide otherwise).

C. Final Matters

¶ 41 Having resolved the statutory issues, we reject C.H.'s Eighth Amendment argument, which she raises for the first time on appeal. *See People v. Tallent*, 2021 CO 68, ¶ 12 ("To preserve a claim, a party must make an objection 'specific enough to draw the trial court's attention to the asserted error.'" (quoting *Martinez v. People*, 2015 CO 16, ¶ 14)). Even assuming that plain error review applies, C.H. has provided no authority directly supporting her position. Thus, we cannot say that it was plain error for the trial court not to conclude that limiting the sealing of criminal records constitutes a form of "punishment" and that it is "cruel and unusual" to disallow the sealing of a deferred judgment when the defendant was

convicted of an offense in the same case. *See People v. Procasky*, 2019 COA 181, ¶ 33 (an error is plain when it is obvious, substantial, and so undermines the fundamental fairness of the proceeding as to cast serious doubt on the reliability of the judgment); *Romero v. People*, 2017 CO 37, ¶ 6 ("To qualify as plain error, the error must be one that 'is so clear-cut, so obvious,' a trial judge should be able to avoid it without benefit of objection." (quoting *People v. Ujaama*, 2012 COA 36, ¶ 42)). *See generally People in Interest of T.B.*, 2021 CO 59, ¶¶ 26-27 (setting out Eighth Amendment principles).

¶ 42 We decline to consider the parties' arguments as to whether C.H. timely requested a hearing and whether the trial court was required to provide one under the provisions in section 24-72-706(1) pertaining to non-excluded offenses. If C.H. requests a hearing on remand, the trial court can consider that request under the applicable provisions in section 24-72-706(2)(b).

¶ 43 Finally, it is not for us to question why the General Assembly chose to preclude the sealing of any records of a deferred judgment, a partial dismissal, or an acquittal simply because the defendant was convicted of an offense in the same case — regardless of

whether that conviction separately qualifies for sealing. Nor is it our task to discern whether the General Assembly just didn't consider the limitations of section 24-72-705 when it expanded the availability of record sealing for convictions in section 24-72-706. Our role is to apply the law as written, *People v. Mazzarelli*, 2019 CO 71, ¶ 33, and that's what we've endeavored to do here.

## IV. Disposition

¶ 44 The trial court's order is affirmed to the extent that it denied the request to seal records of the trespass deferred judgment, and it is reversed to the extent that it denied the request to seal records of the harassment conviction. The case is remanded to the trial court to consider and make findings on the request to seal the records of the harassment conviction under the standard set forth in section 24-72-706(2)(b).

JUDGE WELLING and JUDGE LIPINSKY concur.